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ZAKARIA ABDULLAH & ORS

v.

LEMBAGA PERLESENAN TENAGA ATOM & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
ROHANA YUSUF J
[JUDICIAL REVIEW NO: R2-25-35-02-2012]
12 APRIL 2012

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ADMINISTRATIVE LAW: *Judicial review - Application for - Challenging decision of Lembaga Perlesenan Tenaga Atom in granting company temporary operational license - Atomic Energy Licensing Act 1984, s. 32 - Whether could be invoked - Exercise of appeal to Minister - Whether the proper forum - Whether court should proceed to review power over decision - Whether application premature*

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This leave application by the applicants was made for the purpose of applying for judicial review challenging the decision of Lembaga Perlesenan Tenaga Atom in granting Lynas Malaysia Sdn Bhd (LYNAS) a temporary operational license (TOL) pursuant to the Atomic Energy Licensing Act 1984 ('the Act'). The applicants also sought for a stay order pending the disposal of the judicial review application. The applicants were all residents near the town of Gebeng where the Lynas Advanced Materials Plant (LAMP) was located. The Atomic Energy Licensing Board (Board) approved the application by LYNAS for Temporary Operating License (TOL) pursuant to reg. 23 of the Radiation Protection (Licensing) Regulations 1988. The applicants were now applying to quash the decision of the first respondent in approving the TOL. The applicants submitted that the granting of TOL by the first respondent was in breach of the law, in particular the Environmental Quality Act 1974, and was irrational for failing to take into account environmental concern. The AG's chambers raised the objection on this leave application for failure to comply with s. 32 of the Act which allowed domestic remedy to the applicants, namely, the right of appeal to the Minister on any decision made by the Board under the Act. The applicants, however, contended that the failure to exhaust internal remedy was no bar to this action (*Majlis Perbandaran Pulau Pinang v. Syarikat Kerjasama Serbaguna Sungai Gelugor dengan Tanggungan*) and that this was a case of a decision amenable for a judicial review.

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Held (dismissing the application):

(1) One must look at the facts in its entirety to determine whether there exists a decision which has affected the applicant to determine if the decision is amenable to judicial review (*Wee Choo Keong v. Ketua Pengarah Perkhidmatan Awam*; refd; *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor*; refd). A concluded government stance which is likely to affect or infringe the right of an applicant has been suggested to be a decision that the court can declare a declaration upon. Thus, the decision of the first respondent in approving the TOL was a decision amenable to judicial review. (paras 15 & 16)

(2) The peculiar facts of the present case disclosed that s. 32 had been invoked. There was already an appeal pending under s. 32 filed by five other persons on the same impugned decision. The Minister had acted under s. 32 and had fixed a timely hearing date of the appeal. In view of the fact that the issues involved were technical, scientific and concerned environmental issues affecting the health and environment of the nation, surely that tribunal was in a better position to hear the complaints and grievances than the court of law. Issues of facts and findings on technical matters would be more appropriately deliberated in such a forum. Hence, this statutory remedy better suited the case and would more satisfactorily dispose of the grievances and complaints of the applicants. (para 21)

(3) The appeal lodged by these five appellants before the Minister was made pursuant to the requirement of the relevant provisions of the Act and it must be given due deference. The exercise of appeal to the Minister is an exercise pursuant to the provision of the Act, and the court could not in the face of the appeal process pending before the Minister now undermine that process. If the court were to proceed with its reviewing power over a decision, which was in fact pending appeal through a statutory provision, the court would be rendering that appeal superfluous, thus making that which was enacted by Parliament meaningless. Under these circumstances, the judicial review application by the applicants was premature. (para 22)

(4) The letter issued to LYNAS as shown in the written submission of the putative respondent stated that the first respondent had suspended all the issuance of all the TOL also pending the disposal of the hearing of the appeals brought by the five appellants mentioned above. The suspension was made pursuant to s. 16(6) of the Act. There was no necessity to quash the said decision and hence leave to apply for an order of *certiorari* should not be allowed because the decision was no longer in effect. The application for a stay order had also become redundant. (para 26)

(5) The applicants also prayed to obtain leave to apply for a prohibitive order against the first respondent from issuing TOL until and unless a Detailed Impact Assessment Report was made to the second respondent, Ketua Pengarah Kualiti Alam Sekitar, and the second respondent approved the said detailed report. In other words, the applicants sought for an order for the first respondent to comply with relevant laws before issuing the TOL. Such order was ludicrous because it could not be the duty of the court to order the first respondent to comply with relevant laws. Only when laws are transgressed can the remedy be sought in court. (paras 28 & 29)

Case(s) referred to:

Association of Banks Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Government of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(foll)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 FC ***(refd)***

Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri [2011] 1 LNS 1002 HC ***(refd)***

R v. Secretary of State for Employment exparte Equal Opportunities Commission [1995] 1 AC 1 ***(refd)***

Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2010] 9 CLJ 505 FC ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2002] 2 CLJ 697 CA ***(refd)***

Wee Choo Keong v. Ketua Pengarah Perkhidmatan Awam [2010] MLJU 1097 ***(foll)***

Legislation referred to:

Atomic Energy Licensing Act 1984, ss. 8, 16(6), 32(2), (4)
Federal Constitution, arts. 5, 8, 13
Radiation Protection (Licensing) Regulations 1988, reg. 23
Rules of the High Court 1980, O. 53 r. 8

For the applicants - Tommy Thomas (K Shanmuga, Preetha Pillai, Mahalatchumi Balakrishnan & Azira Aziz with him); M/s Tommy Thomas
For the 1st & 2nd respondents - Suzana Atan (Noor Hisham Ismail with him); AG's Chambers
For the 3rd respondent - Dato' Puthucheary (Wong Kah Hui & SS Chin with him); M/s Jeff Leong, Poon and Wong

Watching brief:
Denny Kwa - Bar Council
Chan Yen Hui - MMA
Jessica Binwani - CAP & SAM
Shamila Segaran - MCCHR

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf J:

[1] This leave application by the applicants is made for the purpose of applying for judicial review challenging the decision of Lembaga Perlesenan Tenaga Atom in granting Lynas Malaysia Sdn Bhd (LYNAS) a temporary operational license (TOL) pursuant to the Atomic Energy Licensing Act 1984. In the judicial review application, the applicants sought reliefs for an order of *certiorari*, prohibition, and other consequential reliefs. The applicants also sought for a stay order pending the disposal of the judicial review application.

[2] The applicants are all residents near the town Gebeng in Pahang where the Lynas Advanced Materials Plant (LAMP) is located, which is, between 2km to 20km from their respective homes. The Atomic Energy Licensing Board (Board) approved the application by LYNAS for Temporary Operating license (TOL) pursuant to reg. 23 of the Radiation Protection (Licensing) Regulations 1988. LYNAS has been issued with Class A license for the construction of the plant, which is now 95% completed. According to the first respondent, other classes of TOL have also been approved for LYNAS on 30 January 2012 but not issued.

[3] The applicants are now applying to quash the decision of the first respondent in approving the TOL. The grounds of application by the applicants are that the granting of TOL by the first respondent is:

1. in breach of the law in particular the Environmental Quality Act 1974 (EQA);

2. in breach of the Constitutional guarantee under arts. 5, 8 and 13;

3. irrational for failing to take into account environmental concern experienced in China; and

4. tainted with conflict of interest when the board makes LYNAS contribute financially to the board for its research purposes.

[4] The Attorney General Chambers raises objection on this leave application for failure to comply with s. 32 of the Act. Learned Senior Federal Counsel Puan Suzana Atan (Encik Norhisham bin Ismail with her) (SFC) submitted that s. 32 of the Act allows domestic remedy to the applicants the right of appeal to the Minister on any decision made by the board under the Act. The putative respondent, LYNAS on the invitation of this court under O. 53 r. 8 of RHC also raises objection on the ground that this court does not have jurisdiction to decide on scientific facts such as the issue of radiation level and safety measures necessary to safeguard the health and well-being of Malaysians and the environment. As such, these issues ought to be put forth before the Minister by way of appeal. This is because according to learned counsel for LYNAS, Dato' Dominic Puthucheary (Encik Wong Kah Hui with him) the Act has been designed to protect the public in that any appeal must be brought before the Minister who will invite input on the complaints and issues raised. Under the appeal process to the Minister, objections can be raised by any person aggrieved by the decision of the Board. Following that, the Minister under s. 32(4) may call for evidence required in hearing the various grievances raised. The appellant in the appeal process are allowed representation by counsel.

[5] Learned counsel for LYNAS and the SFC brought to the attention of this court that there is now established a Jawatankuasa Pilihan Khas Mengenai Projek LYNAS or the Parliamentary Select Committee (PSC) passed by the Dewan

Rakyat on 20 March 2012 as shown in the Hansard. The said committee is comprised of five representatives from Barisan Nasional with a Minister as the Chairman, three members of the opposition party, and one independent member of the house. The objective of this committee is to deliberate on issues under s. 8 of the Act. Learned SFC submitted that this committee is made up of representatives of the people elected through general election and hence ought to be taken to represent the voice of the people.

[6] Learned counsel for the applicants Encik Tommy Thomas (Encik K Shamuga with him) submitted that at leave stage the applicants need only to show an arguable case citing in authority, *Association of Banks Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33. He contended that the failure to exhaust internal remedy is no bar to this action relying on the decision in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65. He further submitted that the decision of Court of Appeal in *Robin Tan Pang Heng v. Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2010] 9 CLJ 505 relied upon by the SFC, which insists on exhaustion of internal remedy does not apply in this case, because in *Robin Tan*, it was never decided or considered whether it is appropriate to deny leave purely because the internal remedy has not been exhausted.

Findings

Whether There Is A Decision Amenable To Judicial Review

[7] At the earlier date of the hearing of this leave application there were discussions that brought into focus as to whether indeed, there is already a decision taken by the first respondent to be impugned in this application. I make an order for the first respondent to explain the nature of the TOL that have been approved or issued to LYNAS up to this point. The affidavit deposed on behalf of the first respondent and affirmed by the secretary of the board Raja Abdul Aziz bin Raja Adnan filed in court in encl. 8 explains the said position. In his affidavit in encl. 8, he deposed that LYNAS has been approved with the following licenses:

(i) on 16 August 2007 class A license for milling was issued for the construction of the processing plant, and is already 95% completed;

A (ii) on 30 January 2012, TOL class G was approved, to enable LYNAS to process raw material for lanthanide concentrates to extract rare earth; and

(iii) TOL Class E import was approved for storing residue at its
B plant site.

[8] According to the first respondent, the TOL above are necessary to be issued firstly to observe and assess whether the activities involved are within its safety parameters; secondly, to ensure that LYNAS corrects and improves any relevant activities
C and thirdly to build baseline data for the first respondent.

[9] It was also brought to the attention of this court that in its meeting of 22 March 2012, Raja Abdul Aziz issued a letter to LYNAS to suspend the licences under s. 16(6) of the Act. In his
D letter the following is stated:

> Dimaklumkan bahawa Lembaga yang bersidang pada 22 Mac 2012 yang lalu telah memutuskan untuk menangguhkan pengeluaran TOL kepada LYNAS (M) Sdn Bhd sehingga perbicaraan rayuan kepada YB Menteri Sains Teknologi dan
E Inovasi (MOSTI) oleh Tan Bun Teet dan 5 yang lain melalui Tetuan Bastian Vendargon pada 7 Februari 2012, selesai. Penangguhan ini juga dibuat di bawah Seksyen 16(6) Akta Perlesenan Tenaga Atom 1984 (Akta 304).

F **[10]** The applicants' case is that LYNAS had been granted TOL to do all the activities through licenses issued to LYNAS, which under the law would allow LYNAS to operate waste treatment activity. It was argued that the effect of TOL under the law is that LYNAS is now able to do all the licensed activities. Hence,
G there is a case of a decision amenable for a judicial review. Though it is stated that it is on temporary basis as opposed to permanent, all it means is that LYNAS is now able to conduct all the necessary activities under the TOL.

H **[11]** At the end of the paragraph, the deponent states that though the class E and G licences are approved they have not been issued to LYNAS. In this affidavit the following is stated:

> Akhir sekali, saya sesungguhnya menyatakan bahawa walaupun kesemua Lesen Kelas A (termasuk TOL), Kelas E dan Kelas G
I tersebut telah diluluskan setakat dan pada 30 Januari 2012, sehingga ke hari ini ketiga-tiga lesen tersebut masih belum dikeluarkan secara rasmi oleh responden Pertama kepada LYNAS

dan ini bermakna, kilang Lynas masih belum boleh beroperasi walaupun pada peringkat pengendalin pemprosesan sementara. Pada ketika ini, kilang Lynas adalah pada tahap 95% dalam proses pembinaannya.

[12] The last paragraph in this affidavit shed little light in determining if indeed there exists an amenable decision for judicial review. There is no provision under the law that a license approved may not be issued. A license approved is as good as issued. Still, it remains unclear if indeed LYNAS has in fact been licensed temporarily at least for the said purposes stipulated in the affidavit.

[13] If I were to delve further on this issue, it appears that the first respondent has not maintained a consistent stand. If the first respondent's stand is that there has yet a decision been made for the purpose of judicial review, then how does one explain the reason why the appeal lodged under s. 32 was entertained. This is clearly stated in the affidavit in encl. 7 on behalf of the first respondent by the same deponent.

[14] In affidavit he deposed that, on 16 February 2012 after the TOL licenses were approved, the Minister received appeal notice under s. 32 of the Act from Tan Bun Teet, Ismail Abu Bakar, Tan Ah Meng, Syed Talib bin Syed Sulaiman, Abujavalli a/p Raman and Hashimah binti Ramli made through Messrs Bastian Vendargon. The Minister had even set date for the hearing of the appeal.

[15] On this basis alone, it becomes plain and clear that there is already a decision made by the first respondent. In this regards I am in agreement with the decision of my learned brethren Zawawi Salleh J in *Wee Choo Keong v. Ketua Pengarah Perkhidmatan Awam* [2010] MLJU 1097, that one must look at the facts in its entirety, (in that case a letter issued by the respondent therein) to determine whether there exists a decision which had affected the applicant to determine if the decision is amenable to judicial review. This is also the decision of the Court of Appeal in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2002] 2 CLJ 697. A concluded government stance which is likely to affect or infringe the right of an applicant has in *R v. Secretary of State for Employment exparte Equal Opportunities Commission* [1995] 1 AC 1 been suggested to be a decision that the court can declare a declaration upon.

[16] On this issue, I therefore agree with learned counsel for the Applicants that the decision of the first respondent in approving the TOL is a decision amenable to judicial review.

Internal Appeal Process

[17] I now come to the main objection raised in this application. That is, the failure of the applicants to exhaust internal remedy. The Act contains appeal process and it is laid out in Part VII. Section 32 of the Act provides that any person who is dissatisfied with any decision of the appropriate authority made under the Act may appeal to the Minister. The grounds of appeal would have to be submitted to the Minister not less than 10 days before the time fixed for hearing. Under s. 32(2), the Minister will have to fix time to hear the appeal and the person appealing can be represented by counsel. The Minister may call for evidence required for hearing of the appeal.

[18] It is the contention of learned counsel for the applicants that the failure to exhaust this appeal remedy is not a bar to an application for judicial review. This is the decision of the higher court in *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 also the Federal Court decision in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65. I agree with learned counsel on this legal position. In my earlier decision, I had adhered to that same legal principle in *Metacorp Development v. Ketua Pengarah Hasil Dalam Negeri* [2011] 1 LNS 1002 cited in the written submission of the putative respondent.

[19] The availability of internal remedy cannot bar a judicial review application on a complaint of error of law that goes to the legality of the decision-making. For the purpose of this application, there is an allegation of breach of the law in particular the Environmental Quality Act 1984 (EQA) when the TOL was approved without a comprehensive report on Environmental Impact Assessment (EIA) required under the law. It is also true that at this stage, the applicants only need to establish an arguable case as decided in the Association of Banks Officers, Peninsular Malaysia. Since this is an exparte application, I should accept the statement of the applicants that the first respondent had allegedly transgressed the law particularly the EQA. On this alleged breach

of law the applicants may bypass the internal remedy under the Act relying on the Federal Court decision in Majlis Perbandaran Pulau Pinang.

[20] However, the peculiar facts of the present case disclose that s. 32 has been invoked. There is already an appeal pending under s. 32 filed by five other persons on the same impugned decision. The Minister had acted under that s. 32 and had fixed a timely hearing date of the appeal, on 17 April 2012, which in fact is a week away from today.

[21] The wisdom for Parliament to enact this appeal process is not difficult to grasp. Matters that are brought up in challenge relates to issues, which are highly technical in nature. In view of the fact that the issues involved are technical, scientific and concern environmental issues affecting health and environment of the nation, surely that tribunal is in a better position to hear the complaints and grievances than the court of law. Issues of facts and findings on technical matters would be more appropriately deliberated in such a forum. Hence, this statutory remedy in my view better suits the case and will more satisfactorily dispose of the grievances and complaints of the applicants.

[22] Furthermore, the appeal lodged by these five appellants before the Minister is made in pursuant to the requirement of the relevant provisions of the Act and it must be given due deference. The exercise of appeal to the Minister is an exercise pursuant to the provision of the Act, and the court cannot in the face of the appeal process pending before the Minister now undermine that process. If the court were to proceed with its reviewing power over a decision, which is in fact pending appeal through a statutory provision, the court would be rendering that appeal superfluous, thus making that, which is enacted by Parliament to be meaningless. Under these circumstances in my view the judicial review application by the applicants is premature. This court should not allow the applicants' impudence of the pending appeal by granting leave for a judicial review. Needless to say, it may lead to confusion and embarrassment in the event that the findings of the Minister differ from that of the court.

[23] The appeal process will dispose the same issues raised by the applicants in this application albeit raised by different persons. Matters concerning environment and health can be resolved in that appeal process where the Minister is able to invite

A professional and expert inputs that are required. In that way, the issues raised by the applicants here will be deliberated in that appeal. The first respondent had also deferred issuance of the licenses till the disposal of that appeal.

B **[24]** There is also another dimension that cannot be ignored in relation to this application. The house of Parliament is also pursuing the same exercise through its Parliamentary Select Committee. The Parliamentary Select Committee (PSC) has been appointed to investigate the safety standard of LAMP. The Select C Committee is represented by elected members of Parliament both from the opposition and the Government. That would be a proper channel to look and deliberate on the complaints and grievances voiced by the electorates.

D **[25]** Encik Tommy Thomas contended that the PSC has nothing to do with this application and there is no law that prohibits two branches of the Government to simultaneously deal with the same matter. With respect, I am not able to agree with such a non-benevolent argument. Obviously having all the branches of the government focusing on the same issue is a sheer waste of public E resources and public funds. Potentially it may cause embarrassment. The three branches of the Government should not be in competition. That is not their purpose. The court should hesitate to interfere in view of the fact that a more prudent approach is now been invoked to deliberate similar issues raised F under the appeal.

[26] Further to that, the letter issued to LYNAS on 23 March 2012 as shown in the written submission of the putative respondent, states that the first respondent had suspended all the G issuance of all the TOL also pending the disposal of the hearing of the appeals brought by the five appellants mentioned above. The suspension was made pursuant to s. 16(6) of the Act. In view of the suspension made, there is no necessity to quash the said decision and hence leave to apply for an order of *certiorari* H should not be allowed because the decision is no longer in effect. The application for a stay order has also become redundant.

[27] Learned counsel for the applicants submitted that leave for the second prayer should be allowed. The second prayer is I prohibitory in nature which is:

that the Applicants be granted leave to apply for an Order of Prohibition prohibiting the First Respondent from issuing any temporary or permanent license to the Third Respondent unless and until:

i. the Third Respondent submits a Detailed Environmental Impact Assessment Report to the Second Respondent; and

ii. the Second Respondent approves the said Detailed Environment Impact Assessment Report.

[28] This second prayer by the applicants is to obtain leave to apply for a prohibitive order against the first respondent from issuing TOL until and unless a detailed impact assessment report is made to the second respondent, and the second respondent approved the said detailed report. In essence, this prohibitive relief is to prevent the first respondent from issuing TOL to LYNAS unless the EIA is made under the Quality Environmental Quality Act 1984.

[29] It would appear from this prayer that the applicants are seeking for this court to make an order for the first respondent to comply with relevant laws before issuing the TOL. It cannot be the role of the court, to order the respondent to comply with written laws. Such order is ludicrous because it cannot be the duty of the court to order the first respondent to comply with relevant laws. All laws of Malaysia must be complied with by everyone in this country. It is simply unnecessary for the court to compel compliance of law. Only when laws are transgressed the remedy can be sought in court.

[30] Having deliberated on the objections raised in this application and bearing in mind the peculiar facts and circumstances of the present case I agree with the objections raised by the learned SFC and also the putative respondent. In my considered view the appeal process that is taking place had to be given effect because it is process provided by the statute, it is a more suitable and appropriate forum to discuss matters highly technical in nature.

Premised on all the above reasons, I hereby dismiss the application in encl. 1 and I make no order as to costs.